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91-861

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

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No. 91-

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MIKE TODD, . . . . . Petitioner

v.

CAREY SMITH, individually and in his official capacity as former City Manager of the City of Myrtle Beach, South Carolina, MACK STONE, individually and in his official capacity as former Director of the Myrtle Beach Convention Center, and the CITY OF MYRTLE BEACH, South Carolina, a municipal corporation . . . . . Respondents.

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

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## QUESTION PRESENTED

Was an official policy of the City of Myrtle Beach established when the city administrator and convention center director closed down the petitioner's art exhibit, with the full knowledge and acquiescence of each of the city's council members, without following required due process procedures governing claims of obscenity, which would create liability under 42 U.S.C. § 1983 (1988) as a violation the petitioner's rights secured by the First and Fourteenth Amendments to the United States Constitution?

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Petitioner Mike Todd prays that a writ of certiorari issue to review the judgment of the Supreme Court of South Carolina in this case.

## OPINIONS BELOW

The opinion of the South Carolina Supreme Court appears in Todd v. Smith, 407 S.E.2d 644 (S.C.1991) and is attached in the Appendix hereto. The opinion of the South Carolina Court of Common Pleas was reported in the Order of Judge James E. Moore of July 21, 1989 and also appears in the Appendix.

## JURISDICTION

The judgment of the South Carolina Supreme Court was entered on August 5, 1991. A timely petition for rehearing pertaining to issues not raised in this Petition for Writ of Certiorari was denied on September 4, 1991. This Petition for Writ of Certiorari was filed within 90 days of August 5, 1991. This Court's jurisdiction is invoked under 28 U.S.C.A. § 1257(a) (West Supp. 1991).

## STATUTORY PROVISION INVOLVED

United States Code, Title 42:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

> For the purposes of this section, any Act of congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1988).

STATEMENT OF THE CASE

Mike Todd, the plaintiff in this proceeding and the petitioner herein, brought this civil rights action by service of a summons and complaint on November 8, 1988. The action was part of a Temporary Restraining Order application and alleged that the Defendants had censored Mr. Todd's art exhibit at the Myrtle Beach Convention Center without due process of law. The controversy arose when City Councilor Marjorie Stonebrook asked then City Manager Carey Smith to

look at one of Mr. Todd's exhibits, Appendix at 60, which Jane Charles, President of the Waccamaw Arts and Crafts Guild which conducted the exhibits, found unsuitable for showing, Id. at 60-61. After negotiations regarding placement of the painting in controversy fell through, the exhibit was closed and locked by Defendant Stone, the director of the convention center, under the direct orders of Defendant Smith. Id. at 62-63. The exhibit was re-opened to the public after Plaintiff obtained a Temporary Restraining Order from Circuit Judge Sidney T. Floyd, who granted the injunction on the grounds that the Defendants had unilaterally decided that the painting was obscene without following just procedure. Id. at 65-66.

The Plaintiff took a voluntary non-

suit without prejudice on the initial civil rights action. However, after the Plaintiff's re-opening of the exhibit was thwarted by a previously scheduled bluegrass music convention, which took over the lobby of the convention center where the exhibit had been, Mr. Todd brought action against the City of Myrtle Beach, Mack Stone, and Carey Smith pursuant to 42 U.S.C. § 1983 (1988) alleging a violation of his civil rights secured by the First and Fourteenth Amendments to the United States Constitution. Id. at 66. The issue of whether the city's knowledge and acquiescence constituted a governmental policy was raised by the Defendant Smith's testimony at his deposition that he, in fact, talked to all of the council members about the controversy and his actions.

Id. at 62-66.

The circuit court granted summary judgment in favor of all the defendants. The circuit judge set forth that no evidence existed to prove that the interference with the Plaintiff's art exhibit was the result of a policy or custom of the city, and therefore, the municipality could not be liable under 42 U.S.C. § 1983 (1988). Id. at 41-44.

On appeal, the South Carolina Supreme Court found that no policy of the city had been promulgated by the informal and individual discussions with members of the city council. Todd v. Smith at 647. A strong dissent by South Carolina Supreme Court Justice Toal found that the evidence demonstrated a municipal policy, which would create liability under 42 U.S.C. § 1983 (1988). Id. at 647.

This Petition for Writ of Certiorari, pertaining to the issue of whether an official policy of the city was established, follows.

## REASONS FOR GRANTING THE WRIT

### 1. THE DECISION BY THE SOUTH CAROLINA SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The decision below has limited the scope of what constitutes a policy subjecting a municipality to liability under 42 U.S.C. §1983 (1988). A municipality is subject to liability under 42 U.S.C. § 1983 (1988) for violation of federally protected rights. Monell v. Department of Social Service, 436 U.S. 658 (1978). The South Carolina Court of Appeals succinctly set out the elements a plaintiff is required to plead for this cause of action as follows: (1) an

official policy or custom (2) that causes the plaintiff to be subjected to (3) a denial of a constitutional right. Moore v. City of Columbia, 284 S.C. 278, 326 S.E.2d 157 (Ct. App. 1985). "[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom . . . inflicts the injury the government as an entity is responsible under § 1983." Monell, at 694. The origin of the policy and custom phrases stems from a desire that a governmental entity not be held liable simply because it employs a tortfeasor. The respondeat superior theory is not applicable under 42 U.S.C. § 1983 (1988). The governmental entity is required to be more directly involved in the acts bringing about denial

of a constitutional right for liability to be imposed.

The South Carolina Supreme Court's decision in the Todd case invokes immunity to a municipality when the official policy makers have individual knowledge of the unconstitutional acts by their agents and acquiesce in those acts, but do not "call a meeting and repudiate the actions . . ." Todd v. Smith at 647. Pembaur v. City of Cincinnati, 475 U.S. 469 sets forth that a single decision by the policy makers of a municipality may subject the municipality to liability under appropriate circumstances. Also, the omissions of a municipality which constitute tacit authorization of or deliberate indifference to constitutional violations have been held to be actionable. Avery v. County of Burke, 660 F.2d 111 (4th Cir.

1981). The majority's opinion in the Todd case exacts a limitation on what constitutes a government policy under the Monell line of decisions.

Moreover, the correctness of the decision below is open to serious question since the official policy makers were much more directly involved than under a respondeat superior theory. Here, each member of the city council had personal participation with the municipal employee, and the employee could have inferred a tacit approval of the conduct. Similar to the occasions where plaintiffs have successfully established a custom before this Court by a systematic pattern, which would tend to show that a municipality had knowledge of and acquiesced in actions causing liability under 42 U.S.C. § 1983 (1988), evidence was presented in the

lower court to demonstrate that each of the policy makers had knowledge of and acquiesced in the acts as follows:

> Q. Was this decision made by you and Mr. Stone?
>
> A. Yes.
>
> . . . .
>
> Q. So this decision was made by you? He was carrying out your order to close down the show?
>
> A. Yes.
>
> . . . .
>
> Q. Did you clear this with the city?
>
> A. Well, what do you mean by "clear"?
>
> Q. Well, did you ask them for their input and their thoughts on what should be done?
>
> A. Yes.

Q. And who did you talk to?

A. I did discuss it with them in general terms. Of course, by that time, there was a lot of publicity in the newspapers and the radio and the television and that sort of thing. So they were generally aware of what had happened. We basically, my recollection is, talked to them individually and told them what we were going to do, what we thought was best to do in the situation.

Q. Did they concur with that?

A. No one really said - - and, of course, the council would have had to have acted as a body to have told me, you know, "Don't do this." And if they

had done that as a body, then I would not have done it. But they did not give me any such instructions.

Q. Did you talk with Mayor Ficken?

A. I'm sure that I did, yes.

Q. He concurred that it should be removed or closed down?

A. I don't recollect, you know, his specific reaction. What I do recollect, though, is that I was not given any instruction. The council was aware of what we were going to do and we were not given any instruction to the contrary as to not to do what we planned.

Todd v. Smith, at 648 (citing this excerpt involving the decision made by City Manager Carey Smith to close the exhibit).

The South Carolina Supreme Court has limited when an official policy pursuant to 42 U.S.C. § 1983 (1988) may be established by refusing to hold that a municipal government may not avoid liability by simply refraining to act.

2. THE SOUTH CAROLINA SUPREME COURT'S DECISION RAISES A SIGNIFICANT AND RECURRING PROBLEM CONCERNING THE SCOPE OF WHAT IS NECESSARY TO ESTABLISH A GOVERNMENT POLICY UNDER THE MONELL V. DEPARTMENT OF SOCIAL SERVICES, 436 U.S. 658 (1978) LINE OF CASES.

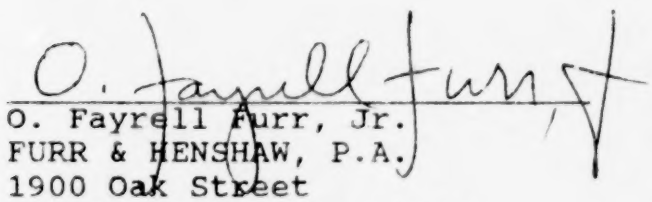
The United States Supreme Court's approach to 42 U.S.C. § 1983 (1988) has been divided and has led to confusion and uncertainty about governmental accountability for invasions of civil rights. See generally, Susannah M. Mead, 42 U.S.C. § 1983 Municipal Liability: The Monell Sketch Becomes a Distorted Picture, 65 N.C. L. Rev. 517 (1987)(noting that the

Court should not interpret the policy or custom causation requirement in a way that would undermine the broad remedial purpose of the statute). Because a municipality can be held liable only when it is directly at fault, establishing the scope of what may constitute a policy or custom of a municipality is an important federal issue. Circuit court decisions have been handed down which address retained unexercised authority as establishing a policy or custom, see, e.g., Spell v. McDaniel, 824 F.2d 1380 (4th Cir. 1987); Bowen v. Watkins, 669 F.2d 979 (5th Cir. 1982), but the final word in this area is still unclear. This case provides an opportunity for the Court to more clearly set out boundaries in this area of the law.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the South Carolina Supreme Court.

Respectfully submitted,



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